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No. [redacted]723

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM 1958

No. 703

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Material Facts

Basically the statement made by petitioner in its brief is correct so that respondent considers it unnecessary for it to repeat at length the background facts involved.

The petitioner commenced this action in the Common Pleas Court of Franklin County, Ohio, in August, 1954 to recover meat inspection fees paid by it between May 1, 1947 and October 31, 1953, purusant to a regulation of the Board of Health of the Columbus, Ohio, City Health District, which regulation had been declared invalid by a prior decision in a case to which petitioner was not a party.

Petitioner joined as defendants the members of the Board of Health of the Columbus, Ohio, City Health District, the Mayor of the City of Columbus, Ohio, and the City of Columbus, Ohio, Subsequently, on November 7, 1956, the petitioner voluntarily dismissed all the defendants except the City of Columbus, Ohio, and proceeded to trial solely against the said City of Columbus, Ohio. The City of Columbus, Ohio, is a municipal corporation; the Columbus, Ohio City Health District is a political subdivision of the State of Ohio, separate and distinct from the City of Columbus, Ohio. The fees were paid to the treasurer of the City of Columbus, who also was the custodian of the funds of the Columbus, Ohio, City Health District.

B. No Constitutional Question Decided.

The Ohio courts have consistently held in this action that the payments made by petitioner were made to the Columbus, Ohio City Health District and not the City of Columbus, Ohio, and that accordingly the petitioner could not recover from the respondent, City of Columbus, Ohio, fees paid to another political subdivision of the State of Ohio.

The Ohio courts have also consistently held in this action that the petitioner received benefits for the fees paid substantially equal to the amount paid and could not replace the Columbus, Ohio City Health District in status quo, and that under Ohio law this precludes recovery of the fees paid.

The courts held that either ground was sufficient to preclude recovery by petitioner. Neither the Common Pleas Court nor the Court of Appeals discussed or decided any constitutional question. The only vestige of a constitutional question being decided by any Ohio court was the

dismissal of petitioner's appeal by the Ohio Supreme Court upon the grounds that no debatable question is involved. Basically, that also is the contention of respondent.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No Federal Question has been Decided by the Ohio Courts, but they have Based their Decisions on the Adequate State Grounds that the Payments, Recovery of Which is Sought, were not made to this Respondent.

The petitioner, David Davies, Inc., has appended to its petition for a writ of certiorari, copies of the opinions of the Tenth District Court of Appeals and the Franklin County Common Pleas Court. (See appendixes II and III of the petition). A reading of these opinions reveals that they contain no reference to any Federal Constitutional question. Petitioner has likewise included as appendix VI of the petition for a writ of certiorari a copy of the judgment entry of the Ohio Supreme Court. For the benefit of the court, respondent has included as appendixes I and II to this brief copies of the judgment entries of the Tenth Dsitrict Court of Appeals, and the Franklin County Common Pleas Court.

A reading of these entries and opinions clearly reveals that the Ohio courts decided the instant action upon two grounds, either of which standing alone is sufficient to sustain a judgment denying recovery by petitioner. At this point we shall consider only one of these grounds, namely, that the petitioner made no payments to the respondent, City of Columbus, Ohio. This conclusion is almost axiomatic that no recovery can be had for payments involuntarily made from a third party not a party to the transaction. Petitioner argued that some sort of privity

should be found, but the Ohio courts denied this contention. Basically, the Ohio courts stated, in this regard, that the petitioner had brought the wrong defendant into court and should have maintained its action against the Columbus, Ohio, City Health District. Petitioner itself created this condition purely voluntarily by dismissing the members of the Board of Health of the Columbus, Ohio, City Health District. In this regard, we quote briefly from the opinion of the Franklin County Common Pleas Court:

> "• • • It is our opinion, therefore, that all of the monies paid by David Davies, Inc., as meat inspection fees during the period in question, were paid to the treasurer of the City of Columbus as custodian for the Columbus City Health District and that the latter was a political entity separate and apart from the City of Columbus. • • •
>
> "It is our opinion, therefore, that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the city treasurer as custodian for the City Board of Health • • •."

That the Columbus, Ohio, City Health District is a political subdivision separate and distinct from the City of Columbus, Ohio, is established by Ohio law and conceded by petitioner. (See numbered paragraph 4 on page 11 of the petition for a writ of certiorari.); *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1; 27 N. E. 2d 773; *Brunner d.b.a. Brunner Meat Packing et al v. Rhodes, Mayor, et al.*, 95 Ohio App. 259; 119 N. E. 2d 105.

This honorable court has ofttimes refused to take jurisdiction where a decision of a State Court has been based on adequate non-federal grounds, e.g., *Portland Railroad Co. v. Portland & Kennebec Railroad Co.*, 81 U. S. 23, 20 L. Ed. 850; *Roth v. Ehman, et al.*, 107 U. S. 319, 27 L. Ed. 499, 2 Sup. Ct. Rep. 312.

In order for the Supreme Court of the United States to take jurisdiction of a judgment of a state court, it must appear not only that a Federal question was argued or presented to that Court for decision, but also that such Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Moore v. Mississippi, 21 Wall. 636, 22 L. Ed. 653; *Brown v. Atwell*, 92 U. S. 327, 23 L. Ed 511, *Marrow v. Brinkley*, 129 U. S. 178, 32 L. Ed. 658, 9 Sup. Ct. Rep. 267; *Blount v. Walker*, 134 U. S. 607, 33 L. Ed. 1036, 10 Sup. Ct. Rep. 606; *Rogers, Jr. v. Jones*, 214 U. S. 196, 53 L. Ed. 965, *Browne v. Union Pacific Railroad Co.*, 267 U. S. 255, 69 L. Ed. 601, 45 Sup. Ct. Rep. 669; *George O. Richardson Machinery Co. v. Scott*, 274 U. S. 729, 71 L. Ed 1319, 48 Sup. Ct. Rep. 264; *Utley v. St. Petersburg*, 292 U. S. 106, 78 L. Ed. 1155, 54 Sup. Ct. Rep. 593; *Bass v. Milledgeville*, 295 U. S. 721, 79 L. Ed. 1675, 55 Sup. Ct. Rep. 926; *Fox Film Corp. v. Miller*, 296 U. S. 207, 80 L. Ed. 158, 56 Sup. Ct. Rep. 183; *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 89 L. Ed. 2092; 65 Sup. Ct. Rep. 1475.

This court has repeatedly held that it will not review a state court decision founded on an adequate and independent non-Federal ground even though the state court may also have erroneously decided a Federal question presented to it for decision. *Lynch v. New York*, 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16. The Honorable Chief Justice Hughes in delivering the opinion of the Court made the following statement at pages 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to

the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, supra; Walter A. Wood, Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528, supra; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; Cuyahoga River Power Co. v. Northern Realty Co. 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157 1158, 37 S. Ct. 643."

In addition to the cases cited above and those cited in the above quotations, other decisions in accord with the views expressed in the *Lynch* case, supra, include: *Honeyman v. Hanan*, 300 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. 350; *Southwestern Bell Telephone Company v. Oklahoma*, 303 U. S. 206, 82 L. Ed. 751; 58 Sup. Ct. 528; *Woolsey v. Best*, 299 U. S. 1, 81 L. Ed. 3, 57 Sup. Ct. 2; *Williams v. Kaiser*, 323 U. S. 471; 89 L. Ed. 398; *Stembridge v. Georgia*, 343 U. S. 541, 96 L. Ed. 1130, 72 Sup. Ct. 834; and *Dwiley v. Mayo*, 351 U. S. 277, 100 L. Ed. 1178, 76 Sup. Ct. 806.

The above cases are ample authority why this court should not entertain jurisdiction of this cause. The Ohio courts have decided this cause upon the entirely independent non-Federal ground that the wrong defendant was brought into court. Even if the courts were erroneous in their other conclusion that the petitioner had no right to recover in any event, recovery would still be precluded as against the sole respondent, the City of Columbus, Ohio, upon the ground that the Columbus, Ohio City Health District and not the City of Columbus, Ohio would be the proper party to proceed against. Petitioner originally brought this action against both entities, but prior to trial and decision in the Common Pleas Court voluntarily elected to proceed solely against the City of Columbus, Ohio. That petitioner made an unfortunate choice should be of no concern to this Court.

The petition reveals that petitioner bases its argument that a federal question is involved upon the assumption that the payments were made to the City of Columbus, as is clearly evinced by the following statement at page 13 of the petition:

> "Petitioner therefore was entitled to recovery of these funds from the City of Columbus, to which the payment was made * * *."

The Ohio courts have decided, however, that in fact and as a matter of Ohio law the payments in question were not made to the City of Columbus but rather were made to the City Health District. Thus, petitioner's entire argument fails because it is based upon an erroneous premise.

In view of the foregoing it is respectfully submitted that the petition for a writ of certiorari should be denied for the reason that the decison of the Ohio courts was based

upon the adequate and independent non-Federal question that no payments had been made by petitioner to the sole remaining respondent.

2. There has been no Denial of Due Process for the Petitioner has Received Full Benefits for the Payments made and to Permit Recovery of such Payments would Result in an Unjust Enrichment of Petitioner.

The second ground upon which the Ohio courts have resolved this case is that the petitioner has received full value for the fees paid in the form of meat inspection services and cannot now place the Board of Health of the Columbus, Ohio City Health District in status quo. The judgment entry of the Common Pleas Court (see appendix II), which is the only indication of the ground upon which this cause has ben decided, contains the following conclusions of law:

> "• • • 3. Plaintiff acquired possession of something of value, namely meat inspection services • • •
>
> "4. It is impossible for plaintiff now to return said services and thereby put said Board of Health in status quo.
>
> "5. Plaintiff has received full value for the fees paid by it for said meat inspection services rendered by said Board of Health. • • •"

Petitioner has cited two decisions concerning the recovery of illegal taxes. *Ward v. Love County*, 253 U. S. 17, and *Carpenter v. Shaw*, 280 U. S. 363. Both of these cases involved the imposition of taxes upon real property in Oklahoma owned by Indians, which property had been declared to be tax exempt by virtue of a treaty between the Indians and the United States. In several other cases, however, this Court has dimissed appeals involving attempts to re-

cover taxes paid on the ground no Federal question was involved. *Tyler v. Cass County*, 142 U. S. 288, 35 L. Ed. 1016, 12 Sup. Ct. 225; *Bellows Falls Power Co. v. Massachusetts*, 245 U. S. 630, 6..2 L. Ed. 520, 38 Sup. Ct. 63; *Mississippi ex rel. American Mfg. Co. v. Reynolds*, 245 U. S. 635; 62 L. Ed. 523, 38 Sup. Ct. 189; *Sears v. Nahant*, 248 U. S. 542, 63 L. Ed. 412, 39 Sup. St. 133.

We are not here concerned with illegally assessed taxes, but rather are concerned with the collection of meat inspection fees which were subsequently declared to be invalidly imposed, not because they were excessive or in any way a denial of due process, but because the entity imposing the fees had no authority to impose them. (*See Brunner et al. v. Rhodes*, supra, set out in full as appendix IV to the petition.) In this regard, it must be remembered that only twenty per cent of the meat inspected was sold within the City Health District, the remaining eighty per cent being sold in other localities, most of whom required meat inspection. All of the meat inspected was sold in Ohio. Thus, the meat inspection services rendered by the City Health District to the petitioner enabled it to carry on a substantial business outside the district and which had no connection with the District. The benefits thus ensuing to petitioner were real and substantial for it was thereby enabled to carry on a substantial business that could not have been carried on had the City Health District for financial reasons ceased all meat inspection services. Petitioner made no effort to obtain this service elsewhere, but rather admits that this meat inspection service was essential to its continuing to maintain its business outside the City Health District. Essentially all the Ohio courts have done is apply the principle that if someone accepts the benefits under an invalid law or regulation he is

estopped to repudiate its burdens. See 11 *Am. Jur.* 767 (Constitutional Law Sec. 122). See also 19 *American Jurisprudence* 682-687 (Estoppel Sec. 64) wherein it is stated:

> "Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. * * * Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation. * * *"

Thus, the petitioner has been deprived of no right but rather has merely received application of the principle that no one is entitled to receive something for nothing nor to accept the benefits of an invalid regulation and then repudiate the obligations thereunder.

As to a denial of due process, there is even less justification for that argument here than in the situation wherein an ordinance imposing a special assessment has been declared invalid for procedural and technical reasons, and a re-assessment is made upon the benefited properties involved after the improvement has been completed. This Court has, however, declared that the making of such a re-assessment does not constitute a denial of due process. *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Longbard v. West Chicago Park*, 181 U. S. 33; 45 L. Ed. 731, 21 Sup. Ct. 507; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. Ed. 232, 25 Sup. Ct. 44.

Petitioner has cited no authority to support its position that it has been deprived of its property without due process of law. Two of the cases it cites are discussed

and distinguished above. The other two cases cited involved situations wherein persons attempted to secure jurisdiction of the Federal Courts to enjoin state imposition of taxes. The courts merely held that an adequate remedy at law existed by way of an action to recover the taxes paid if they were illegally assessed. Those cases, likewise, are not applicable for the further reason that no question of benefits received and retained was involved.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied for two reasons:

(1) Because the cause was decided by the state courts on the adequate and independent non-Federal ground that the payments recovery of which is sought were not made to the sole respondent, City of Columbus, Ohio, and accordingly petitioner cannot recover such payments from respondent.

(2) Because petitioner received full value by way of the benefits ensuing from the services rendered enabling petitioner to maintain a substantial business outside the City Health District and cannot now return those benefits and should not be permitted to accept such benefits and at the same time repudiate the obligations which are a necessary corollary to the benefits accepted.

Respectfully submitted,

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APPENDIX I

Journal Entry of the Court of Common Pleas

This day this cause came on to be heard on the pleadings and an agreed statement of facts and was submitted to the court, a jury having been waived.

On consideration thereof and upon request of counsel for the plaintiff, the court states herein its conclusions of fact found separately from the conclusions of law as follows:

As conclusions of fact, the court finds that:

1. This case was submitted to the court upon the pleadings and an agreed statement of fact and the court, accordingly, incorporates herein all of the facts set forth in said agreed statement of fact and all facts admitted to be true in the answer and reply as its conclusion of fact herein.

And as conclusions of law, based on the foregoing conclusions of fact, the court finds:

1. The regulations of the Board of Health of the Columbus, Ohio city health district, under which the meat inspection fees here in question were paid by plaintiff, were void, and said Board of Health had no power or authority to assess or collect said fees.

2. The payments of meat inspection fees by plaintiff herein were involuntary payments.

3. Plaintiff acquired possession of something of value, namely, meat inspection services which had been performed by the Board of Health of the Columbus, Ohio city health district, under a regulation which was later declared to be void.

4. It is impossible for plaintiff now to return said services and thereby put said Board of Health in status quo.

5. Plaintiff has received full value for the fees paid by it for said meat inspection services rendered by said Board of Health.

6. The treasurer of the city of Columbus, Ohio, in accepting and receiving the meat inspection fees paid to it by David Davies, Inc., was accepting and holding said fees as custodian for the Board of Health of the Columbus, Ohio city health district.

7. The treasurer of the city of Columbus, did not receive or hold said fees for the city of Columbus, Ohio.

8. The defendant, city of Columbus, Ohio, is not liable for moneys paid to the treasurer of the city of Columbus, Ohio, as custodian for the Board of Health of the Columbus, Ohio city health district.

9. At all times alleged in the petition the Columbus, Ohio city health district was a political entity separate and apart from the city of Columbus, Ohio.

10. The duty imposed on the council of the city of Columbus by Section 4451 G. C. did not alter the independent status of the Columbus, Ohio city health district.

11. Columbus City Ordinances No. 204-47, No. 286-47 and 2-48 did not alter the independent status of the Board of Health of the Columbus, Ohio city health district.

12. Any benefit received by the defendant, city of Columbus, Ohio, from payment of said meat inspection fees by the plaintiff was indirect and can not be the basis of a judgment against the defendant, city of Columbus, Ohio.

Based upon said conclusions of fact and law the court finds against the plaintiff herein and in favor of the defendant, city of Columbus, Ohio, all other defendants herein having heretofore been dismissed from this action.

It is, therefore, hereby ordered, adjudged and decreed that plaintiff's petition herein be and the same is hereby

dismissed and that judgment be and is hereby rendered in favor of the defendant, city of Columbus, Ohio, and against plaintiff, David Davies, Inc., and that the costs of this action be assessed against the plaintiff herein.

To all of which plaintiff herein excepts and its exceptions are hereby noted.

APPENDIX II

Entry of the Court of Appeals

This cause came on for hearing on an appeal on questions of law, assignments of error, the transcript, agreed statement of fact and the original papers and pleadings from the Court of Common Pleas, Franklin County, Ohio, and was argued by counsel; on consideration thereof, the court finds that the trial court held that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the city treasurer as custodian for the City Board of Health, and further held that plaintiff was not entitled to recovery. The court further finds that it is in accord with the reasoning of the decision of the trial court and that accordingly the several assignments of error are not well taken and should be overruled and that the judgment of the Common Pleas Court should be affirmed.

It is therefore ordered and adjudged that all assignments of error herein by plaintiff-appellant be, and they hereby are, overruled, and that the judgment of the Court of Common Pleas of Franklin County, Ohio be, and it hereby is, affirmed, and that this appeal be, and it hereby is, dismissed at the costs of plaintiff-appellant. To all of which plaintiff-appellant excepts and its exceptions are hereby noted.